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ABSTRACT

This paper discusses Congressional and judicial attempts to deal with the problem of employment practices which lead to discriminatory outcomes but which may not be discriminatory in intent. The use of paper and pencil tests as standards for hiring and promotion is focused on as an example of this type of employment practice. An historical account of the passage of Title VII and a description of Federal court interpretations of the law are presented. The author states that although Title VII does not explicitly forbid employment practices which are discriminatory in effect if they are not discriminatory in intent, the courts have generally ruled that tests used as standards for hiring and promotion have a discriminatory impact and that firms must be able to prove that their tests bear a "manifest relationship to the employment in question." It is found that, in the majority of cases, courts have rejected respondents' attempts to prove the validity of their testing programs, although lower courts may be expected to increasingly find that tests are valid in the future. It is concluded that it is difficult to get Federal courts to make decisions on technical questions on which a professional consensus has not developed. (Author/BE)

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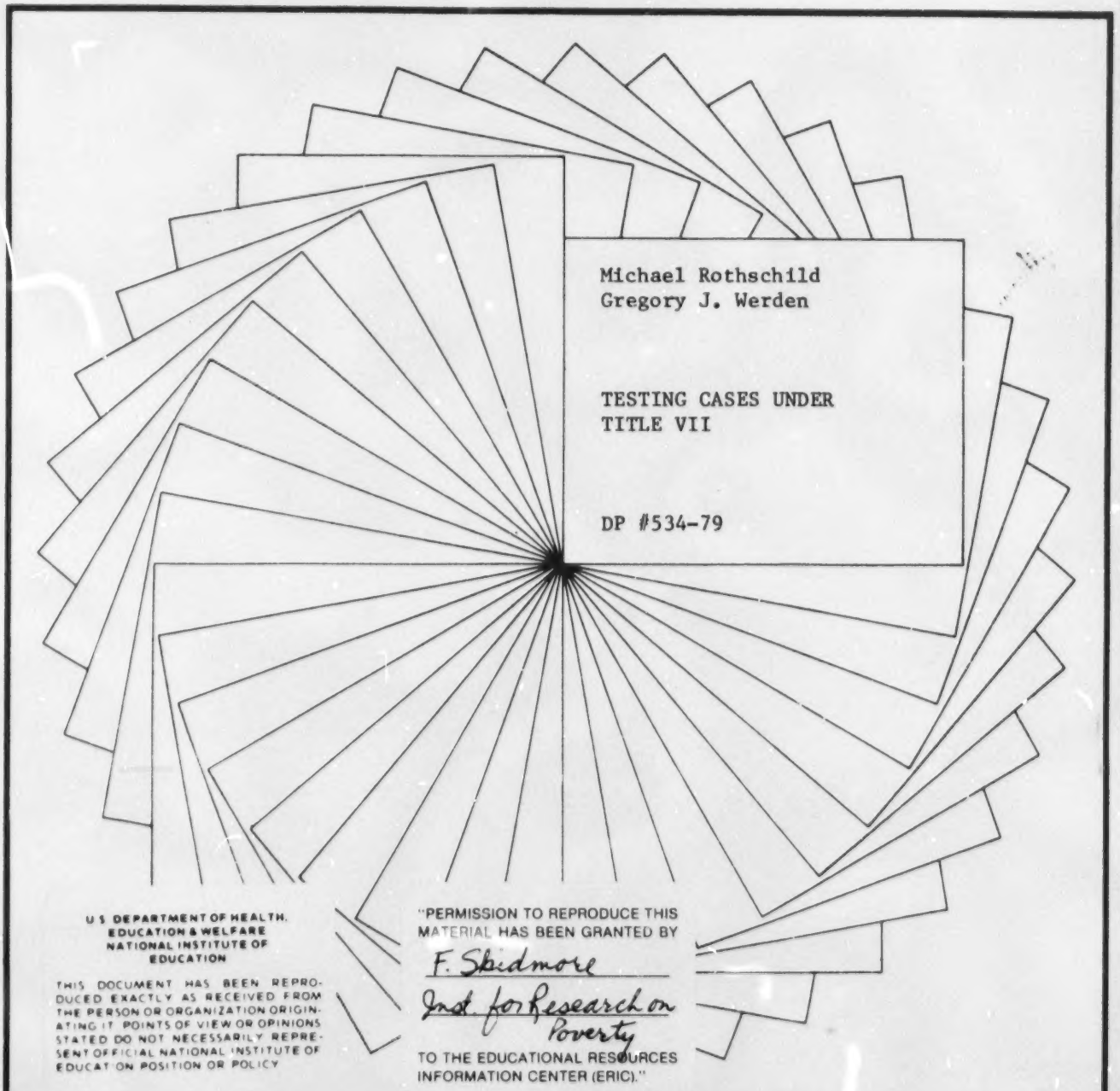


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# Testing Cases under Title VII

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ABSTRACT

Title VII of the 1964 Civil Rights Act prohibited discrimination in employment because of race. It did not explain how the Federal Courts were to determine when such discrimination had occurred. This is a difficult technical problem because employment practices which are not intended to discriminate often have discriminatory consequences. Neither the legislative history of Title VII nor social science theory provides adequate guidance to courts attempting to enforce Title VII, and it is not surprising that the resulting court decisions are somewhat muddled. Federal courts are not good instruments for resolving consistently questions on which neither a technical nor a political consensus has developed.

## Testing Cases under Title VII

Title VII of the 1964 Civil Rights Act prohibits "discrimination in employment . . . because of race, color, religion, or national origin."[1] It charged the Equal Employment Opportunity Commission (created by Title VII) and the federal courts with enforcing this prohibition but it did little to explain how they were to determine what was, and what was not, "discrimination in employment because of race."[2]

This was to prove, as the congressional debate on Title VII predicted, a most vexing question. The difficulties do not stem from the phrase "discrimination in employment" which, as the floor managers of Title VII, Senators Case and Clark, pointed out in an interpretative memorandum, "is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor."[3] Although given to more dramatic renderings, opponents of Title VII did not disagree with this interpretation.[4]

The phrase "<u>because</u> of race" (emphasis added) is the problem. The proponents of Title VII made it clear that Title VII would not prohibit seemingly discriminatory outcomes. The Case-Clark memorandum states:

> There is no requirement in Title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications and he may hire, assign, and promote on the basis of test performance.[5]

In debate Senator Case asserted that "under Title VII, even a Federal court could not order an employer to lower or change job qualifications simply because proportionately fewer Negroes than whites are able to

meet them."[6] But suppose an employer does use a test which whites pass more often than blacks. The language of Title VII would seem to require a court to determine whether or not he is using that test because he wants to hire more whites than blacks or for reasons having nothing to do with his racial preferences. The text of the legislation provides no guidance to courts trying to resolve this issue.

This paper is a discussion of how the federal courts have dealt with this issue in the years since Title VII became law. We will focus on the use of paper and pencil tests as standards for hiring and promotion and not on seniority and other such standards (e.g., tests of physical skill and agility, requirements of height and weight, and the use of credentials like high school degrees and prison records).[7]

We can define discriminatory outcomes of the employment process as differences in employment, promotion, or compensation along racial lines.[8] At present we distinguish two possible causes of discriminatory outcomes; later we will add a third.

## TASTE FOR DISCRIMINATION

The first and simplest is the employer's desire to reach such an outcome. The classic analysis of this phenomenon, Gary Becker's Economics of Discrimination (2nd ed., 1971), showed how an employer's "tastes for discrimination" or those of his workers or customers could lead him to discriminate against blacks. An employer can accomplish this purpose in several ways. The most direct method is to establish explicit racial criteria for hiring and promotion. Explicit racial job classifications were once common among both northern and southern firms; state fair

employment practices statutes and Title VII clearly prohibit such behavior. Avowedly discriminatory behavior is now quite rare. A less straightforward, and probably less efficient, method of indulging a taste for discrimination is to establish hiring standards which favor whites over blacks. For example, a lower percentage of blacks than whites complete high school. Making a high school diploma a requirement for a job will tend to keep blacks out. Again, whites tend to score better than blacks on some standardized ability and intelligence tests.[9] Using these tests to rank or screen applicants for jobs will tend to keep blacks out of those jobs. The employer with a taste for discrimination will have little difficulty finding racially neutral employment practices which permit him to indulge his taste.

## THE PURSUIT OF EFFICIENCY

It is hard to distinguish behavior which is motivated by a taste for discrimination from that which stems from the second reason for achieving discriminatory outcomes: the adoption, by an employer who neither harbors nor indulges in prejudice, of hiring standards which discriminate against blacks.[10] There are several reasons that a profit-maximizing employer could adopt such standards and it will be useful to distinguish among them. Suppose, for simplicity, that there is a single quality, A ("ability"), which each potential worker possesses. The amount of A a worker has tells exactly how much he is worth to an employer. Thus if an employer could measure or observe A he would pay workers in proportion to their A; he might also establish a rule of hiring workers whose A was above a certain level. If A were distributed differently among black and

white workers this would lead to discriminatory outcomes. Such a differential racial distribution of A could come about either because there were real racial differences in ability or, to quote again from the Case-Clark memorandum, owing to "differences in background and education members of some groups perform better . . . than members of our groups."[11]

Abstract ability cannot be simply defined; nor can it be observed without cost. It is more realistic to suppose that some set of traits, B, is observable and that these traits are correlated with A. Then an employer would hire and pay workers according to their possession of B. Again if B were differentially distributed between races the outcome would be discriminatory. It is worth noting that whether or not A is race-related says nothing about whether B is race-related.

The possibility that an employer could use several different methods to predict A introduces a complication. Consider the case of two methods; suppose that as well as B, C also predicts A. Suppose also that methods B and C are mutually exclusive alternatives, and that the two techniques can be distinguished both by their efficiency (their ability to predict A) and their discriminatory impact. Which should the employer use? The language of the Case-Clark memorandum suggests that under Title VII the employer should choose the most efficient method, even if it is the most discriminatory. He surely should not choose the less efficient if it is also the more discriminatory technique; a finding that he had done so would be good evidence that he was acting "because of race."

This categorization of the ways in which discriminatory outcomes might be achieved raises two questions. First, which methods are prohibited by Title VII and second, how can courts or enforcing agencies differentiate among the cases? If the second question can be answered,

that is, if reasons and motives for discriminatory outcomes can be discerned, the first question--what the law prohibits--raises only a few difficulties. Clearly the law prohibits an employer from indulging in his own taste for discrimination. It is perhaps less clear that the employer cannot cater to the tastes of his customers (by, for example, refusing to use black salesmen) or his employees, but a literal reading of the phrase "because of race" would seem to cover these cases. Of course, this principle has limitations. Sex can be used as a screen for hiring cocktail waitresses. Ministers may be selected because of religion. Section 703(e) of Title VII states that:

> it shall not be an unlawful employment practice for an employer to hire and employe employees . . . on the basis of [their] religion, sex, or national origin in these certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[12]

This provision does not seem to permit businesses to satisfy tastes for discrimination of customers or employees.

But it is also clear, if not from the text of the act, at least from the interpretations of its two sponsors, cited earlier on page 1, that the use of employment policies designed and intended to minimize costs is not prohibited by Title VII--even if these policies have a discriminatory impact. There is one exception to this rule. If the ability, A, of the applicant, is not observable, race or color, either of which is easily observable, may be correlated with ability.[13] It could maximize profits, in such a case, to establish explicit racial categories for hiring. Title VII does not permit this. Race may not be used as a "bona fide occupational qualification." Even if race or color is not at issue, we doubt section 703(e) covers these cases; Title VII

appears to proscribe the use of sex, religion, and national origin to classify or screen workers because of the information such classifications might provide about a potential employee's ability.[14]

Thus, with the exception of some niggling difficulties, the purpose and scope of Title VII are clear. Employers are prohibited from indulging their tastes for discrimination but are permitted, in the pursuit of profit or efficiency, to adopt policies which are discriminatory in effect. Unfortunately, different motives could lead two employers, the one desiring to discriminate, the other hoping only to increase his wealth, to adopt the same policies. The problem that courts trying Title VII cases faced was that of establishing machinery to distinguish between the cases.

## LEGISLATIVE HISTORY

If the text of the statute provides no guidance for this task, neither does its legislative history. The Senate debate on Title VII revolved around, but did little to resolve, this problem. Opponents of Title VII directed their attacks on the specter of federal intervention in ordinary business procedures. They worried that equal employment legislation would provide a reason for the government and private citizens to harass with suits and administrative proceedings all those whose employment practices were discriminatory in effect. Since defending such actions would be costly and time-consuming, employers would, it was feared, often concede and adopt quotas rather than attempt to defend themselves against such actions. Thus, they argued, Title VII would lead to hiring by quota as surely as if it had mandated such quotas.[15] This was a powerful argument, as a law establishing racial quotas or prohibiting

all employment and selection procedures which were discriminatory in effect would not have passed Congress.[16]

A state fair employment practices case, in process while the Senate debated Title VII, provided an example of what the opponents of Title VII feared. In Myart v. Motorola, the hearing examiner appointed by the Illinois Fair Employment Practices Commission ruled that Motorola had discriminated unlawfully by refusing to hire Myart, a black applicant for employment. Although this holding was based on the examiner's finding that Motorola had not hired Myart even though Myart's test scores qualified him for the job he sought,[17] the examiner further ruled that the test which Motorola gave Myart--a short, general-purpose intelligence test--could no longer be used. He gave as his reason that the test was 15 years old and had been standardized only for advantaged groups. Its use in present circumstances was inherently discriminatory and thus inconsistent with "the spirit as well as the letter" of the Illinois Fair Employment Practices Statute.[18]

The best part (in number of pages of the Congressional Record, if not in intellectual content) of the debate on Title VII focused on the charge, by opponents, that enacting Title VII would make rulings like the hearing examiner's in Myart common occurrences. Supporters of Title VII denied that Title VII could be so used. Their denial had two parts. First, the EEOC, unlike the Illinois FEPC, would have no enforcement powers. Second, under the law, an employment practice is not per se illegal merely because it had, or might have, a discriminatory impact.[19] This largely ignored the main point of the attack. Those who were appalled by Myart v. Motorola were not specifically concerned with whether or not the hearing examiner had made a decision encompassed by

the Illinois Statute. (The FEPC of Illinois did not support the hearing examiner's finding that Motorola could not continue to use the tests.) They used the case to illustrate the kind of expensive and time-consuming litigation to which fair employment practice statutes like Title VII would expose firms and bureaucracies which did not adopt quotas.[20] Supporters of Title VII tended to ignore the point that the existence of legislation prohibiting discrimination could expose all employers who used discriminatory employment practices, not just those who were prejudiced, to litigation.

The refusal to face this issue squarely can be seen in the history of the one part of Title VII which might be considered relevant to the problem of determining whether or not employment practices, in particular the use of tests, were unlawful under Title VII. Senator Tower introduced an amendment which would have given absolute protection against violations of Title VII to any employer who gave and acted on the results of "any professionally developed ability test" as long as the test was designed to be used in making placement decisions and was administered to all individuals seeking employment without regard to race, color, religion, sex, or national origin.[21] The bipartisan coalition which ended the filibuster on the Civil Rights Act of 1964 agreed to oppose this amendment and to accept a substitute which, like the debate on Title VII, avoided the central issue of how to determine whether a test with a discriminatory impact was being used legitimately or as a pretext for discrimination. Debate on Tower's original amendment was very brief; those opposed essentially stated that it was unnecessary because Title VII did not prohibit the use of employment tests with a discriminatory impact.

Senator Case did admit that the amendment presented some difficulties because employment tests could be used as a pretext for discrimination.[22]

After the defeat of his original amendment, Tower offered another amendment. This did not give an absolute protection to those who used employment tests but instead provided that it should not "be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed or intended or used to discriminate because of race, color, religion, sex, or national origin."[23] This amendment was accepted by the congressional leadership, the attorney general and the supporters of Title VII; it was passed by voice vote and became part of section 703(h) of the Civil Rights Act of 1964.

This history shows, we think, only that Congress left it to the courts to determine how to decide whether or not an employment practice was being used as a pretext for discrimination. It did not hint whether the employer should have the burden of proving that a discriminatory practice was legitimate or whether a plaintiff should have to show the practice was adopted in order to discriminate because of race. It did not indicate whether a past history of discriminatory practices was to be a basis for assessing present intent.

This discussion may make it appear that only the supporters of Title VII are responsible for the fact that the debate on Title VII did little to resolve or clarify its subsequent interpretation. A good portion of the blame, however, belongs to the opponents of Title VII. Because Senator Eastland was chairman of the Judiciary Committee, the

Senate never held hearings on any part of the Civil Rights Act of 1964. Title VII was largely written by a bipartisan group of Senators led by Senators Mansfield and Dirksen. This group was not an official Senate Committee. Although some of its deliberations were reported in the Congressional Record, no hearings were held and documentation is much less complete than is ordinarily the case.[24] The arguments made against Title VII were often simply fatuous, like those cited in note 4, above. Senator Tower's original attempt to defend the use of tests which might have a discriminatory impact was a cleverly worded amendment which would have gutted the entire bill. That the Tower amendment does little to clarify the status of professionally developed tests, is, we think, due in no small part to the fact that he and other opponents of Title VII were unwilling to admit or even consider the possibility that racial discrimination in employment might, under some circumstances, be a social evil.

## THEORETICAL EXPLANATIONS OF DISCRIMINATORY EMPLOYMENT OUTCOMES

Thus we see that the legislative history and the text of Title VII provide little help to courts attempting to determine when discrimination "because of race" has occurred. It would be extraordinarily convenient if some body of knowledge suggested a simple test for resolving this issue. It might seem that economic theory would suggest such a procedure. Becker first observed that employers who have no desire to discriminate will in general be able to produce at lower cost than those employers who indulge their taste for discrimination.[25] In a particularly competitive world, only the pure in heart will survive. In the real world, however,

this observation is of limited relevance, for three reasons: first, competition or its absence is no test for whether or not a firm is catering to its customers' tastes for discrimination. Second, Title VII prohibits discrimination in regulated and monopolistic industry and (since 1972) in public employment. To know that perfectly competitive firms cannot discriminate does not help one to decide whether AT&T or the San Francisco Police Department are discriminating. Finally, mere ferocious competition--at least as the term is ordinarily used--does not necessarily eliminate discrimination. For a counter example one need only cite (as Becker did) the segregated employment practices of the very competitive southern textile industry.[26] In short, it is rather hard to see how evidence about competition--or its absence--would help in determining the legitimacy of the practices of a particular firm.

Thus, the federal courts have had to decide how to determine which employment practices were discriminatory without the aid of a clear statute, a clear legislative history, or an applicable body of scientific knowledge.

We will emphasize how difficult a problem this is by now analyzing a third, and to us, practically more important reason that employers could adopt employment practices with a discriminatory impact.

It is not commonly appreciated how often ordinary business practice consists of following routine procedures whose content can only be justified loosely and historically. As we will argue briefly, this is a reasonable way to adapt to the fact that running businesses and other bureaucracies is extraordinarily complex. Procedures which work in some rough sense are often desirable, even if they cannot be rigorously

justified, as the best of all conceivable alternatives. Because this seemingly haphazard way of proceeding is a reasonable adaptation to the complexity of business life, a requirement that employment practices be justified and documented will constitute a burdensome intrusion on the firm's way of doing business.

Our view of the decision process in complex organizations runs counter to economic theory, which presumes that all economic agents are perfectly rational calculators. While the traditional view has been useful in generating hypotheses for economic theory, it is, we believe, false on both logical and empirical grounds. It is also, in the present context, misleading. We will summarize briefly the argument against the traditional rational view of the firm.[27]

The empirical argument is that it is simply not true that businessmen and others maximize in the way economic theory assumes they do. This is, in general, conceded by most participants in the debate. However, supporters of the rational view of the firm argue that this is irrelevant; competitive pressure, the economic analogue of natural selection, forces successful firms to behave as if they were maximizing.[28] For two reasons, we do not find this view convincing. Many firms and organizations are quite free of competitive pressures, for example, monopolies, regulated industries and governments, all of which are covered by Title VII. Also, we know very little about how fast competitive pressures select businesses which perform rationally. In a dynamic world, the force of selection may operate sufficiently slowly with respect to the speed of technical change that at a given time in a competitive industry only a small fraction of the industry is behaving rationally--that is, using the best available

techniques. Thus the empirical argument against the notion that businessmen optimize is simply that they do not, and that competitive pressures, which do not impinge on many businessmen and bureaucrats, do not force them to. The logical argument is somewhat deeper (and perhaps less convincing).

As Herbert Simon and others have emphasized, the problems which businessmen and bureaucrats face are tremendously complex.[29] Often, because of uncertainties and computational costs, there is no single best way to solve them or--what amounts to the same thing--the problem has no rational solution. It is not sufficiently appreciated that there is, strictly speaking, no satisfactory definition of rationality when computation is costly and limited.[30] The standard example of this problem is the game of chess. Because a chess game can have only a finite number of possible outcomes (in the sense of successive moves by white and black) it is in principle no more complicated than tac-tac-toe.[31] To find a winning strategy, simply examine all the outcomes and see which strategy wins. This procedure cannot be implemented. It is beyond the power of the human mind to enumerate so many possibilities; no computer of currently conceivable power could undertake such an enumeration.

The absence of a satisfactory definition of rationality when computation is costly means that there is no certain way to decide which procedure or strategy is the best one or even to compare two feasible procedures. How do we assess a strategy for playing chess? The only reasonable way would seem to be empirical. That is, we see how it performs. We cannot hope to know how it does against <u>all</u> strategies for the same reason that we cannot compute the optimal strategy. Thus in evaluating

and adapting a strategy for playing chess, we will try to keep a rough track of how well it does and where it seems to run into problems. Experience and reflection would foster changes, changes which might make it less vulnerable; however, there is no guarantee that such tinkering will lead to improvements.

Playing chess is no more difficult than running a business or a bureaucracy. Students of management science and operations research have shown in principle how to solve many of the organizational and logistic problems which such organizations face (for example, scheduling production runs and stocking inventories). The optimal solutions to many such problems are like the optimal solutions to chess--simple in principle, impossible in practice.[32] In a significant way, however, managing an organization is more difficult than playing chess. Any reasonably competent chess player contemplating a move knows all the possible moves he might make. He will have difficulty assessing the consequences of these moves, but at least he can enumerate them all with no difficulty. In general, managers cannot list and do not know all the alternatives which they might consider.[33]

When it is not possible to proceed rationally, what do bureaucrats and businessmen do? Simon has suggested, in an unhappy phrase, that they "satisfice."[34] Instead of searching for the best procedure, they find one which seems to work tolerably well and stick with it until it obviously is in need of improvement. Then they search for a better way. The quest for a new procedure is likely to be local rather than global in the sense that attempts will be made to modify the old procedure before, and instead of, seeking completely new methods. When an old

procedure is abandoned, only a few of the many conceivable alternatives will be considered.

The relevance of this view of managerial behavior to the employment process is immediate. An employer may have only a very imperfect idea of what constitutes a successful employee. He may try to assess the separate contribution of each of his workers, but he will not do so perfectly. Thus he will not be able even to identify what we earlier called "A." Although he has only an imperfect record of who is a successful employee, and an even more vague picture of the characteristics associated with productivity, he is faced with the necessity of formulating an employment policy. To be satisfactory it must get him the right number of workers; the workers hired must be able to perform the tasks to which they were assigned; the labor bill must be reasonable, but there is no requirement that labor cost be minimized (assuming that this is a well-defined notion, given the complexity of the problem). If the organization is a large one, it will probably be important that the hiring procedure produce reasons for employing some workers and turning away others. An employer will adopt some set of hiring standards which will do an acceptable job for him. These may have a discriminatory impact. There may exist other sets of hiring standards which would have a less discriminatory impact but the employer may not be aware of them and will not, unless pressed, search for them. He may adopt a set of hiring standards appropriate to a given time and not change them as the nature of the applicant pool and of the jobs to be performed changes. Thus he may continue to follow practices which have a discriminatory impact when the need or rationale for such practices has ceased to exist. Behavior of this sort can occur even though

the businessman is not attempting to discriminate and is attempting to run his business in the best and most efficient manner he can.

The fact that employers may choose their employment policies somewhat haphazardly presents difficulties for the interpretation of Title VII. A literal reading of the statute would suggest that adoption of an employment policy which has a discriminatory impact for any reason other than a desire to discriminate would be permitted by Title VII. It could be argued that the purpose of Title VII was to end discriminatory outcomes, insofar as possible, and that those employers whose employment policies discriminated had a special duty to verify that the pursuit of efficiency as profit required such policies. The text of the statute does not support this position. Again legislative history is no help. While some supporters of Title VII certainly held this view, they did not state it and we do not read it (or its denial) into the legislative history of Title VII.

## FEDERAL COURT INTERPRETATIONS OF TITLE VII

We now consider the framework the courts have erected to decide testing cases under Title VII.

Federal court decisions in testing cases take place within the context of three Supreme Court decisions: Griggs v. Duke Power, Albemarle Paper v. Moody, and Washington v. Davis.[35] Albemarle Paper contains the clearest statement of the procedures to be used in such litigation. It adopts for testing cases the three-step procedure used in other discriminatory employment practices. This was enunciated in McDonnell Douglas v. Green.[36] First, "the complaining party or class [must make] out a prima facie case of discrimination, i.e. [it must show] . . . . that the tests in question select

applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants."[37] Second, when a prima facie case has been established, the burden shifts to the employer. The nature of this burden was delineated in Griggs, where the Court held that the test or requirement must be shown to have "a manifest relationship to the employment in question."[38] In Griggs the Court also stated: "The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."[39] Third, if the employer succeeds in convincing the Court that his employment practice is related to the job, then "it remains open to the complaining party to show that other tests or selection devices without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"[40] To our knowledge, the third step has seldom been reached in a testing case.[41]

Therefore the outcome of litigation hinges on the first two issues: What is necessary to demonstrate a prima facie case and how can a test or employment requirement which has a discriminatory impact be shown to be validly related to the job? These are technical questions.

To assert that "tests . . . select applicants for hire and promotion in a racial pattern significantly different from that of the pool of applicants" is to claim a statistical proposition. Establishing or refuting it requires that some technical questions be answered. Three are obvious: First, with what pool of applicants should comparisons be made, those who actually applied for the job or those who might have applied (the local labor market)? The two could differ, either because

blacks were encouraged and recruited or because the company's history and attitudes discouraged blacks from applying. If the pool of applicants is the local labor market, how is it to be defined? Is it the city, the county, the Standard Metropolitan Statistical Area as defined by the Census, or what? Second, when is a difference a significant difference? Finally, is it sufficient to show that the employer both uses tests and hires disproportionately few blacks or must it be shown that the tests themselves are responsible for the discriminatory practices? If the latter, how is causality to be inferred? These issues have all been the subject of litigation.

Attempting to show that a test is validly used to screen persons for employment also raises many technical questions. What kind of correlation between job performance and test results suffices to demonstrate that a test is job-related? Performance on some jobs cannot be assessed easily (lawyers are an obvious example). Can any tests be legitimately used to select a person for these jobs? Must tests be validated in each instance of their use or can employers legitimately rely on the published experience of those attempting to fill similar jobs? Is there such a thing as general ability or intelligence? Can this be a job requirement, or may one test only for narrow abilities clearly required by a particular job? All these questions have arisen in Title VII testing cases.

Although Title VII legislation hinges on the answers to technical questions, they are not questions which can be answered as definitively as some of the technical questions of hard science. Chemists will not disagree as to whether a particular compound contains sulfuric acid, but economists can and do disagree about the appropriate definition of a labor

market to be used to show whether or not a firm hires disproportionately few blacks. Toxicologists will not dispute whether particular substances are poisonous; psychologists differ frequently on whether particular tests (or even any tests) are valid predictors of performance on particular jobs. The questions courts must answer to resolve Title VII testing cases may be described as "soft" technical questions. Because they are technical questions, courts must judge and interpret technical information and arguments which lie beyond both common sense and most lawyers' areas of expertise. Because they are soft questions, experts will not agree. In all but the weakest cases, each side will be able to present scientific evidence (and expert witnesses of impeccable credentials) to support its position.

When courts are charged with deciding whether X has or has not occurred, and when the occurrence of X is a soft technical question, the resulting decisions and body of law are likely to assume one of four forms: First, the courts can almost always decide that X has occurred. Only in rare and clear cases will it be found that X has not occurred. The case law will make it clear that it is very hard indeed to show that X did not happen. The second possibility is the reverse. A string of decisions will make it clear that if a lawyer hopes to win his case he had better do something besides showing that X did not occur. A third possibility is that courts will sometimes decide that X has occurred and sometimes decide that X has not occurred and that the bases of the discrimination are clear both to lawyers and to experts in the field. A fourth and final possibility is that the courts will decide sometimes one way, sometimes the other, but will leave the bases for their distinction unclear both to lawyers and to experts in the field.

Only the third outcome seems desirable. The capricious fourth outcome is clearly unsatisfactory. If it were really the case that X almost always or almost never occurred, then the first or second might be desirable. However, we doubt that issues on which there is professional disagreement are ones in which the truth is always on one side or the other.

In actual practice, decisions in Title VII testing cases have conformed to the first pattern (with an occasional admixture of the fourth).[42] Courts almost always rule that a prima facie case has been made. Courts consistently rule in Title VII testing cases that tests have a discriminatory impact. The consistency of this finding is not because the facts are always clearly on the side of the plaintiff. Often they are not; but courts have almost always interpreted ambiguous evidence in the plaintiff's favor. Indeed the record of decisions on this point is so consistent it is almost as if courts did not recognize the possibility that tests could fail to have a discriminatory impact on minorities.

Once a prima facie case of discrimination has been established, respondents must show that their use of the test was legitimate and that (to quote again from Griggs) the test bears a "manifest relationship to the employment in question." This, too, is a soft technical question and one which courts have answered with a fair degree of consistency. In the great majority of cases, courts have rejected respondents' attempts to prove the validity of their testing programs. Decisions here are not as consistently one-sided as on the issue of establishing a prima facie case. It is not clear how to explain or

categorize the deviations. In part they seem to us simply capricious. In part they represent the evolution of a still-unsettled law. Early Supreme Court decisions (Griggs and Albemarle) gave great weight to guidelines issued by the EEOC. These guidelines set standards for the use of tests; the guidelines were virtually impossible to meet in every particular. After the Supreme Court's endorsement of a strict interpretation of the guidelines in Albemarle, lower courts tended to demand strict adherence to them. As a result, few respondents were able to demonstrate that their tests were valid. Some courts (particularly those in southern circuits) were more lenient. In Washington v. Davis, the court considerably tempered its endorsement of the guidelines. We expect to see lower courts finding that tests are valid more often in the future.

It is not clear to us how to view this record. It is undeniable that this litigation has made testing more costly and has thus led firms, even nondiscriminating firms, to use it less. Conservatives and classical liberals will deplore the intrusion of the government into decisions which should rightly be private and from which the framers of Title VII intended to exclude the government. Less classical liberals, and those concerned with the discriminatory effects of tests, will note that the legislative history of Title VII does not indicate that its framers agreed to anything except to duck difficult issues. They will also point out that the inability of firms to demonstrate "business necessity" suggests that if testing is used less, the social loss is probably not great. Perhaps the only conclusion to which all would agree is that it is difficult to get federal courts to make decisions on technical questions on which a professional consensus has not developed.

NOTES

[1]78 Stat. 255. (The Civil Rights Act was amended in 1972; these amendments extended the coverage of Title VII considerably.)

[2]In order to avoid repeating a cumbersome phrase, in general we will write as if only racial discrimination were at issue. This is only a slight abuse of the facts. Most of the cases considered below concern racial discrimination. In a few, the issue is sex discrimination.

[3]110 Cong. Rec. 7213.

[4]Senator Tower admitted to discrimination against brown shoes, and noted that he had been "very discriminating" when he selected his wife. Senator Talmadge averred that "so long as we have discrimination we have freedom. When we cease to have discrimination we shall have an anthill society." Both were using the word exactly as Senators Case and Clark defined it. 110 Cong. Rec. 7030.

[5]110 Cong. Rec. 7213.

[6]110 Cong. Rec. 7246.

[7]Despite the Tower Amendment discussed below, the status of tests under the law is really no different from that of other practices (except possibly seniority). The Supreme Court made this point in Griggs when it held that "if an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." 401 U.S. 424, 431.

[8]This is deceptively simple. An employment process of a firm has many parts. Some may be discriminatory and others not. Separate practices may discriminate in different directions and thus cancel each other out. A very real problem exists: determining whether specific practices must be shown to be responsible for discriminatory outcomes or whether discriminatory outcomes are by themselves sufficient evidence that the practice(s) are discriminatory.

[9]Among persons 25 years of age or older, 52.3% of whites and 31.4% of blacks had completed high school as of 1970. Census of Population: 1970 Vol. I, Characteristics of the Population, Pt. 1. U.S. Summary, Table 88. On standardized ability tests, see, for example, American Psychological Association, Task Force on Employment Tests of Minority Groups, "Job Testing and the Disadvantaged," 24 American Psychologist, 637-650.

[10]What follows is a verbal discussion of the more technical analysis in our 1977 paper, "Notes on Models of Discrimination" (mimeographed).

[11]110 Cong. Rec. 7213.

[12]78 Stat. 256. Note that race and color may not be "bona fide occupational qualifications."

[13]This correlation could come about not because race and ability are really related but because race is correlated with some characteristic which is both unobservable and correlated with ability. The apparent correlation of race and ability could be due to an inability to observe and measure certain characteristics. See our earlier paper, cited in note 10, above, for a discussion of these largely semantic issues.

[14]To the best of our knowledge, this issue has not arisen in Title VII litigation. Another potential difficulty lurks here. Suppose A, ability, is unobservable while B, which is correlated with both race and ability, is observed. If an employer uses B to screen his employees, can one decide whether he is using B because of its correlation with ability or because of its correlation with race? In part this is the problem of determining motive that is discussed below. In part it is a question of the closeness of the correlations of B with race and ability. Title VII would, presumably, not allow an employer to use the number of X or Y chromosomes to distinguish among his workers. This would unquestionably be discrimination on the basis of sex. But could an employer use a characteristic whose correlation with race or sex was .95 or even .5 (out of a maximum of 1)? The answer is not obvious. Statistics and probability theory can provide some guidance, but where the law should draw the line is not at all clear.

[15]See, for example, the colloquy between Senators Stennis and Tower. 110 Cong. Rec. 9034.

[16]Section 703(j) specifically denies that Title VII shall be construed as requiring an employer to grant preferential treatment to any group because that group is not proportionately represented in the employer's present work force.

[17]Motorola claimed Myart was unqualified; the hearing examiner ruled that Motorola did not adequately document Myart's failure. Long after Title VII had been enacted, the Illinois Supreme Court reversed on the grounds that the examiner's conclusions of fact were unreasonable. 110 Cong. Rec. 9033-33; Motorola v. Illinois FEPC, 215 N.E. 2d 286 (1966).

[18]110 Cong. Rec. 9032.

[19]The debate is reported in 110 Cong. Rec. 7212-13, 7246-47. The hearing examiner in Myart v. Motorola gave no specific evidence that the test discriminated against blacks. Instead he cited some work of social scientists which indicated that in general such tests had discriminatory impact and relied on the fact that the test had not been validated for disadvantaged groups for his conclusion that using the test put minorities at a "competitive disadvantage." 110 Cong. Rec. 9032.

[20]110 Cong. Rec. 9034.

[21]110 Cong. Rec. 11251.

[22]110 Cong. Rec.

[23]110 Cong. Rec. 13724.

[24]For the legislative history of Title VII see Francis J. Vaas, "Title VII: Legislative History," Boston College Industrial and Commercial Law Review (1966).

[25]Economics of Discrimination, 2nd ed., p. 45. For further analysis of this point see Kenneth Arrow, "The Theory of Discrimination," in Orley Ashenfelter and Albert Rees, eds., Discrimination in Labor Markets (1974), and Joseph Stiglitz, "Approaches to the Economics of Discrimination," 63 American Economic Review, 287-295.

[26]Becker writes, "textile industries in the South employ relatively few non-whites; this may seem surprising because textile industries are extremely competitive. . . . This anomaly may be explained by the very

high value added per establishment in textiles . . . since industries with large establishments tend to discriminate more than others" (p. 89). It is clearly Becker's view that competition by itself will not in all circumstances eliminate discrimination. It is worth noting that non-white employment in southern textile industries increased enormously in the sixties.

Black Employment in Southern Industries

| | 1950 | 1960 | 1970 |
|---|---|---|---|
| Total | 22.0% | 17.0% | 14.9% |
| Manufacturing | 19.3 | 15.2 | 16.2 |
| Nondurable manufacturing | 13.8 | 12.2 | 15.8 |
| Yarn and thread | 7.1 | 7.3 | 17.0 |
| Other textile | 14.6 | 10.1 | 14.0 |
| Apparel | 9.5 | 9.1 | 12.9 |

Source: U.S. Census, 1950, 1960 and 1970.

The yarn and thread industry (although it declined while apparel and other textiles grew) was throughout this period the largest textile industry. Accounting for the changing proportion of blacks in the Southern textile industries is complex. We doubt that anyone would assign much of the explanation to an increase in competitive pressures on the textile industry.

[27]Due largely to Herbert Simon, "Theories of Decision Making in Economics and Behavioral Science," 49 American Economic Review, 253-283. For an interesting elaboration see Sidney Winter, "Optimization and Evolution in the Theory of the Firm," in Richard Day and Theodore Groves, eds., Adaptive Economic Models, 1975.

[28]See Arman Alchain, "Uncertainty, Evolution, and Economic Theory," 58 Journal of Political Economy, 211-21, and Sidney Winter, "Economic 'Natural Selection' and the Theory of the Firm," 4 Yale Economic Essays, 225-72.

[29]Simon, "Theories of Decision Making," and Richard Cyert and James March, A Behavioral Theory of the Firm (1963).

[30]A definition of rational behavior under conditions of uncertain and incomplete information was first given by Frank Ramsey, "Truth and Probability," in The Foundations of Mathematics and Other Logical Essays (1931).

[31]The rule which declares a game a draw when the same position recurs three times ensures finiteness.

[32]See, for example, Ray Radner, "A Behavioral Model of Cost Reduction," 6 Bell Journal of Economics, 196-215.

[33]This is largely a difference of degree rather than kind. There are technical grounds for differentiating managerial decisions from chess. (Such considerations—finiteness, existence of exact solutions, or even solvability in the sense of Godel--do not seem relevant here.)

[34]"Theories of Decision Making."

[35]Reported at 401 U.S. 424 (1971), 422 U.S. 405 (1975), and 426 U.S. 229 (1976), respectively.

[36]411 U.S. 792, 802, 804 (1973).

[37]422 U.S. 405, 425.

[38]Id. 401 U.S. 431 (1971).

[39]401 U.S. 424, 432.

[40]422 U.S. 405, 425 quoting 411 U.S. 792, 802.

[41]Possible exceptions are Officers for Justice v. Civil Service Commission of City and County of San Francisco, 395 F. Supp. 378 (N.D. Cal. 1973) where the court rejected an agility test partially because the New York Police Department had one that was not discriminatory, and Jackson v. Nassau County Civil Service Commission, 13 EPD ¶ 11,355 (EDNY 1976) where the court rejected plaintiffs' arguments that there was a feasible nondiscriminatory alternative.

[42]The judgments in the succeeding three paragraphs are based on a study of 77 federal and district court decisions in Title VII testing cases.